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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.N., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

A.N.,

Defendant and Appellant.

E056429

(Super.Ct.No. RIJ1101066)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and
Appellant.

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel,
for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, A.N. (Mother), is the mother of M.N., a boy born in June 2007. Mother appeals from an order denying her Welfare and Institutions Code section 388¹ petition seeking reunification services and liberalized visitation with M.N., and from the section 366.26 order selecting adoption over long-term guardianship as M.N.'s permanent plan. Mother claims she made a sufficient showing of both changed circumstances and best interest in support of her section 388 petition, and that the court erroneously determined that the parental benefit exception did not apply. We affirm the challenged orders.

II. BACKGROUND

A. *The Circumstance of M.N.'s Dependency*

Plaintiff and respondent, Riverside County Department of Public Social Services (DPSS), took M.N. into protective custody in August 2011, when he was four years old, due to concerns for his safety. In May 2011, Mother left M.N. in the care of an acquaintance and enrolled in a residential treatment facility for substance abuse. At that time, Mother was homeless, M.N. was dirty, starving, and had no shoes or underwear. Mother left the facility after 22 days due to "attitudes" in the facility. After Mother left the facility, she was still transient and lived with friends. By August 2011, Mother had not picked up M.N. and her acquaintance was no longer able to care for him.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Mother was 24 years old in August 2011, had a long history of using drugs, and had failed attempts at drug rehabilitation. She admitted using drugs on a daily basis in August 2011, and indicated she had smoked marijuana since she was 12 years old, used methamphetamine since she was 15 years old, and used heroine since she was 17 years old. She made money to support her drug habit by “hustling,” but denied engaging in prostitution. She did not know the identity of M.N.’s biological father.

Mother has four children, and M.N. is her third child. Mother’s fourth child, a boy, was born in January 2011. His father obtained physical and legal custody of him in July 2011, before the dependency proceedings for M.N. were instituted in August 2011. Only M.N. is the subject of this appeal.

In 2005, Mother’s first and second children were removed from her care due to her drug use. In May 2005, Mother left her first child in the care of friends who did not know her whereabouts. Then, when Mother gave birth to her second child in August 2005, she tested positive for methamphetamine. Mother received reunification services for both children but failed to reunify with them due to her continued drug use. Mother’s first child, a girl, was placed with her paternal grandmother, and the second child, a boy, was adopted in 2007 after Mother’s parental rights to the boy were terminated.

On three occasions before August 2011, Mother enrolled in a residential treatment facility but left the program without completing it. Also before August 2011, Mother enrolled in the Riverside County MOMS program but left the program after 20 days.

Mother completed the Born Free substance abuse program and was free of drugs when she gave birth to M.N. in June 2007, shortly before she turned 20 years of age.

Mother claimed she was sober from around 2007 to April 2010, when she was between the ages of 20 and 23. During this period, she was employed by Macy's and Kohl's retail stores. She said she relapsed in April 2010 because she lost her job, she was pregnant, her boyfriend left her, and she was no longer able to keep her apartment. She reported that when she "fell off the wagon, [she] fell hard." She completed the 9th grade before dropping out of school as a teenager, but as of September 2011 she had no desire to complete school.

At the age of 15, Mother was placed in foster care and eventually "aged out of the [foster care] system." She ran away from her foster home because the foster mother was strict. She told the social worker that she got married at the age of 17 so she did not have to return to the foster care system. Mother's stepfather was an alcoholic and severely beat her and her mother when she was a child. Mother's mother and stepfather were addicted to drugs and would deal drugs. Mother was a "parent" to her siblings when she was a child, and stole drugs from her mother and stepfather in order to sell them and buy groceries for her siblings. In September 2011, Mother's mother was in a mental health institution due to an attempted suicide.

In September 2011, M.N. was placed in a prospective adoptive home with the same family that adopted his older half brother, then age six. By October 2011, M.N. had developed a close bond with the family, and was displaying "significant improvements in

his developmental and self-help skills, which were lacking when he was initially placed [in the home].” He called the prospective adoptive father his “papa,” and said he wanted to stay in the home forever. Before he was placed in the home, M.N. had a poor sense of family and a difficult time following directives and rules.

In October 2011, the juvenile court declared M.N. a dependent, denied Mother family reunification services under section 361.5, subdivision (b)(10), (b)(11), and (b)(13), and set a section 366.26 hearing. Mother was granted not less than monthly, supervised visitation with M.N.

In January 2012, DPSS reported Mother had two supervised visits with M.N. in September 2011, and visited him once each month in October, November, and December 2011, and January 2012. Mother was appropriate with M.N. during the visits and tried to engage him in activities. M.N. was responsive to Mother and called her “mommy Abi,” but was not strongly attached to her. Following the visits, M.N. willingly said good-bye to Mother without difficulty.

B. Mother’s Section 388 Petition

In February 2012, Mother filed a section 388 petition seeking family reunification services and liberalized visitation with M.N. A hearing on the petition was held on May 31, 2012, immediately before the section 366.26 hearing.

In May 2012, DPSS reported that Mother entered an inpatient drug rehabilitation program in November 2011 and completed the program in April 2012. Through the program, Mother participated in groups and workshops on parenting, addiction and

relapse prevention, life skills, women's health, and literacy. She tested negative on all random drug tests administered during the course of the program. As of May 2012, Mother was living in a sober living home, looking for a job and an apartment, and planning to return to school.

The prospective adoptive parents were willing to adopt M.N., and reported in May 2012 that M.N. was exhibiting "some sadness" and anxiety following his last two visits with Mother. He defecated and wet his pants at preschool a day or two after each visit. His teacher reported he had made "very good" progress since he began preschool in October 2011.

At the hearing on the petition, Judith Pauly, a self-described "spiritual life coach" who had helped more than one hundred people with drug addictions, testified for Mother. Pauly had been working with Mother since August 2011, and noticed that Mother had changed from a selfish person to a caring person. Around September 2011, Pauly and Mother were driving from a Narcotics Anonymous meeting and saw an SUV flip over. Mother told Pauly to call 911, and "ran over" to help the SUV occupants, including a baby, get out of the vehicle. Mother consoled the occupants and was "very, very present in talking to the police and being aware of everything and everyone who was there." In Pauly's opinion, Mother's circumstances had changed and she should receive reunification services. According to Pauly, Mother had been sober since August 2011 and was ready to make proper decisions and be responsible for her actions.

County counsel commended Mother for the progress she had made, but argued against granting the petition based on Mother's history of returning to drugs, particularly when she was on her own and without support. Minor's counsel agreed, and argued that Mother's circumstances were changing but had not changed. Mother still had to get a job and maintain her sobriety. Minor's counsel also pointed out that M.N. was bonded with his caretakers and would suffer detriment if removed from their care.

The juvenile court denied the petition. While commending Mother for the great progress she had made, the court said it could not find there were changed circumstances or that M.N.'s best interests would be served by granting the petition. (§ 388.)

Proceeding to the section 366.26 hearing, the court rejected Mother's claim that the parental benefit exception to the adoption preference applied. (§ 366.26, subd. (c)(1)(B)(i).) The court terminated parental rights and selected adoption over legal guardianship as M.N.'s permanent plan.

III. DISCUSSION

A. Mother's Section 388 Petition Was Properly Denied

Mother claims the juvenile court abused its discretion in denying her section 388 petition for reunification services and liberalized visitation with M.N. We find no abuse of discretion.

Under section 388, a parent of a dependent child may petition the juvenile court to modify or set aside a prior court order. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; § 388.) The parent has the burden of demonstrating, by a preponderance of the

evidence, that there has been a ““legitimate change of circumstances”” and that granting the requested relief would be in the best interest of the child. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959-960 [Fourth Dist., Div. Two].) The petition is addressed to the sound discretion of the juvenile court, and its denial of the petition will not be disturbed on appeal unless a clear abuse of discretion is shown—that is, unless the court’s decision exceeded the bounds of reason. (*In re Stephanie M.*, *supra*, at p. 318; *In re S.J.*, *supra*, at pp. 959-960.)

Mother argues that her nine-month period of sobriety—from August 2011 to the time of the May 31, 2012 hearing on her section 388 petition—constitutes a sufficient showing of changed circumstances. While she concedes that the possibility of her relapsing was legitimate, she argues that the court failed to give her “adequate credit” for the progress she had made in maintaining her sobriety. She also points out that she was “taking anti-depressant medication as prescribed,” and that granting her reunification services and liberalized visitation would have served M.N.’s best interest because she had a “good relationship” with him and her visits were positive.

Mother’s arguments are unavailing. First, the juvenile court reasonably concluded that Mother’s circumstances had not sufficiently changed at the time of the hearing on the petition, though they were in the process of changing. Mother had been addicted to drugs since her childhood. By her own admission, she was sober for several years after completing the Born Free program, but relapsed around April 2010. As county counsel and minor’s counsel argued at the hearing, Mother did not show she could maintain

sobriety while living on her own. At the time of the hearing, she was living in a sober living home and was looking for a job and an apartment.

The court also reasonably concluded that granting Mother services and liberalized visitation would not serve the best interest of M.N. The record before the court showed that M.N. was happy and thriving in his prospective adoptive home, and had shown signs of anxiety and distress following his recent visits with Mother. Apparently, M.N. was distressed by the prospect of having to leave his prospective adoptive family and, contrary to Mother's claim, she did not share a significant familial bond with M.N.

Mother further argues that her poverty, or her lack of employment or suitable housing for M.N., was not a legitimate ground for denying her petition. (See *In re P.C.* (2008) 165 Cal.App.4th 98, 99-100; *In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1212; see also *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 792 ["We cannot separate parents and their children merely because they are poor."].) We agree, but there is no indication that the court denied the petition because Mother was poor or did not yet have employment or suitable housing for M.N. To the contrary, the court ostensibly denied the petition because Mother had no history of staying sober while living on her own, she did not have a strong familial bond with M.N., and M.N. was thriving in his prospective adoptive home.

B. The Court Properly Concluded That the Parental Benefit Exception Did Not Apply to Mother's Relationship with M.N.

Mother also claims the juvenile court erroneously concluded that the parental benefit exception to the statutory adoption preference did not apply (§ 366.26, subd. (c)(1)(B)(i)), and erroneously selected adoption over guardianship as M.N.'s permanent plan at the section 366.26 hearing. Again, we find no abuse of discretion.

1. The Parental Benefit Exception

At the section 366.26 permanency planning hearing, the juvenile court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Permanent plans include adoption, guardianship, and long-term foster care. (*In re S.B.* (2008) 164 Cal.App.4th 289, 296.) "Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.)

Adoption involves terminating the legal rights of the child's natural parents, but guardianship and long-term foster care leave parental rights intact. (*In re Autumn H.*, *supra*, 27 Cal.App.4th. at p. 574.) "Guardianship, while a more stable placement than foster care, is not irrevocable and thus falls short of the secure and permanent future the Legislature had in mind for the dependent child." (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1344.)

In order to avoid termination of parental rights and adoption, at a section 366.26 hearing a parent has the burden of showing that one or more of the statutory exceptions to termination of parental rights set forth in section 366.26 subdivision (c)(1)(A) or (B)

apply to the child. (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469; *In re Celine R.* (2003) 31 Cal.4th 45, 53.) The exceptions “merely permit the court, in *exceptional circumstances* (*In re Jasmine D.* [(2000) 78 Cal.App.4th 1339,] 1348-1349 [*Jasmine D.*]), to choose an option other than the norm, which remains adoption” (*In re Celine R.*, *supra*, at p. 53).

Under the parental benefit exception (§ 366.26, subd. (c)(1)(B)(i)), the court must “find[] a *compelling reason* for determining that termination [of parental rights] would be detrimental to the child” (§ 366.26, subd. (c)(1)(B), italics added; *In re Scott B.*, *supra*, 188 Cal.App.4th at p. 469). The parental benefit exception applies when two conditions are shown: the parent has “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i); *In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

In order to show that the child would benefit from continuing the relationship with the parent, the parent “must do more than demonstrate . . . an emotional bond with the child”; the parent “must show that he or she occupies a ‘parental role’ in the child’s life.” (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The parent must also show that the parent-child relationship “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship

would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

“‘The balancing of competing considerations must be performed on a case-by-case basis and take into account many variables, including the age of the child, the portion of the child's life spent in the parent's custody, the “positive” or “negative” effect of interaction between parent and child, and the child's particular needs. [Citation.] When the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued parent/child relationship, the court should order adoption.’ [Citation.]” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1349-1350.)

2. Standard of Review

Appellate courts have variously applied the substantial evidence test and the abuse of discretion test in considering challenges to juvenile court determinations that the parental benefit exception to termination did not apply. (*In re Scott B.*, *supra*, 188 Cal.App.4th at p. 469.) There is little, if any, practical difference between the two. (*Ibid.*) As explained in *Jasmine D.*: “[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only “‘if [it] find[s] that . . . no judge could reasonably have made the order that he did.’ . . .” [Citations.]” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

The abuse of discretion standard has traditionally been applied to custody determinations and “seems a better fit” for reviewing a juvenile court’s determination that the parental benefit exception did not apply. (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) This is so because the court must find ““a compelling reason”” for applying the exception, and this is “a quintessentially discretionary determination.” (*Ibid.*) Under either standard of review, the juvenile court properly determined that the parental benefit exception did not apply.

3. Analysis

Mother claims she met her burden of showing that the parental benefit exception applied in part because she visited M.N. as often as she was allowed, and her visits were appropriate. But DPSS did not dispute that Mother maintained regular contact with M.N. by visiting him as often as she was allowed or that her visits were appropriate. Further, Mother’s regular visits with M.N. were insufficient, standing alone, to show that the parental benefit exception applied.

Mother further argues that the record shows she shared a familial bond with M.N. She points out that at the time of the section 366.26 hearing, M.N. had only been living with his prospective adoptive family for eight of his 59 months, and had lived with Mother for “the vast majority of his first five years of life.” Mother also emphasizes that M.N. “understood the concept of a parent,” called Mother “Mommy Abi,” and became teary eyed when he was given a photograph of her.

Nonetheless, the record amply supports the juvenile court's conclusion that the parental benefit exception did not apply. M.N. was bonded with his prospective adoptive parents and family shortly after he began living with them in September 2011. At the time of the section 366.26 hearing, this bond had grown stronger, and M.N. did not share a parental bond with Mother, if he ever had. He was very happy and thriving in his prospective adoptive home, and appeared to be distressed by the prospect of having to leave the home. On this record, the juvenile court plainly did not abuse its discretion in concluding that the benefits of adoption outweighed any benefit M.N. may have realized by maintaining his relationship with Mother.

IV. DISPOSITION

The orders denying Mother's section 388 petition, terminating parental rights, and selecting adoption as M.N.'s permanent plan are affirmed.

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KING
J.

We concur:

RAMIREZ
P. J.

MILLER
J.